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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 518

HELEN M. KIEFER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States District Court for the District of Columbia (R. 13-14) is not reported. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. 27-33) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals reversing the judgment of the District Court and remanding

the cause for trial was entered August 18, 1955 (Pet. 34). The petition for a writ of certiorari was filed November 14, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the Insurance Service of the Veterans' Administration, acting pursuant to regulation, was justified in reinstating a policy of National Service Life Insurance solely in reliance on the applicant's own representations of comparative health, or whether the United States is precluded from later contesting the policy for fraud because the applicant's Veterans Administration disability claim file, the number of which was furnished by the applicant on his application for reinstatement, contained information demonstrating the falsity of the representations.

STATUTE AND REGULATIONS INVOLVED

In pertinent part, the National Service Life Insurance Act of 1940 (38 U.S.C. 801 *et seq.*) provides as follows (as it appears in the United States Code):

§ 802.

* * * * *

(w) *Incontestability of policies.*

Subject to the provisions of section 812 of this title, all contracts or policies of insurance before or after August 1, 1946, issued, reinstated, or converted shall be incontestible from the date of issue, reinstatement, or conversion except for fraud, nonpayment of premium, or

on the ground that the applicant was not a member of the military or naval forces of the United States.

* * * * *

§ 808. *General administrative provisions.*

The Administrator, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this subchapter, shall have power to make such rules and regulations, not inconsistent with the provisions of this subchapter, as are necessary or appropriate to carry out its purposes, and shall decide all questions arising thereunder. * * *

Veterans Administration Regulations 3423 (12 F.R. 7116 (1947)), as amended (13 F.R. 181 (1948)), and 3424 (38 C.F.R. (1946 Supp.) § 10.3424), as amended (13 F.R. 657 (1948)), provide in pertinent part as follows:

§ 10.3423—*Health Requirements*: National Service Life Insurance or any plan may be reinstated if application and tender of premiums are made:

(a) On or before July 31, 1948, or within three months after lapse, whichever is later, provided the applicant be in as good health on the date of application and tender of premiums as he was on the due date of the premium in default and furnishes evidence thereof satisfactory to the Administrator.

(b) Subsequent to July 31, 1948, and after

expiration of the three-month period mentioned in paragraph (a) of this section, provided applicant is in good health (§ 10.3401) on the date of application and tender of premiums, and furnishes evidence thereof satisfactory to the Administrator of Veterans' Affairs.

§ 10.3424—*Application and medical evidence* * * * Applicant's own statement of comparative health may be accepted as proof of insurability for the purpose of reinstatement under § 10.3423(a), but, whenever deemed necessary in any such case by the Administrator, report of physical examination may be required. * * *

STATEMENT

Petitioner sued, as sole beneficiary, for benefits under her deceased brother's National Service Life Insurance policy (R. 1-3). The Government contested the policy on the ground of fraud, alleging that the insured's policy had been reinstated in 1948 in reliance upon an application which falsely represented his comparative health (R. 3-6). The insured had answer questions 8, 9, and 10 of this application as follows (R. 17):

8. Are you now in as good health as you were on the due date of the first premium in default? [x] Yes [ ] No.

9. Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a phy-

sician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere, in regard to your health, since lapse of this insurance? [ ] yes [x] No. (If "yes," give all dates and full particulars below.)

10. Have you ever applied for disability compensation, retirement pay, pension or waiver of insurance premiums? [x] Yes [ ] No. (If "yes," give Claim No. below.) C No. 5 #241 066.

The insured's disability claim file, the number of which he listed in answer to question 10, indicated that he had been discharged from the Army in 1945 on a certificate of disability for bronchial asthma, and was granted a 60% disability compensation, for which a claim number was assigned (R. 10-11). Prior to the lapse of the policy in 1947, the insured, on two occasions, was examined and treated at a Veterans Administration hospital for bronchial asthma (R. 18-37). After the lapse, according to the claim file, he was hospitalized twice under the auspices of the Veterans Administration (R. 18-39). The diagnosis on the first occasion was asthma, mild hypertension and nephritis (R. 35). In March and April 1948, during the second hospitalization lasting nearly a month, his condition was diagnosed as cirrhosis of the liver (R. 39). The examining doctor observed that the patient had been "drinking steadily for six months about a quart a day. His liver is down to its iliac crest. He has been nauseated and vomiting for some time.

No food for 36 hours" (R. 40). This observation was made immediately prior to the reinstatement application in April 1948, in which the insured represented that his comparative health had not changed since the date of lapse and that he had not been ill nor consulted a physician at home or at a hospital during the period of lapse.

In November 1951, the insured was examined for emergency hospitalization, and admitted to the Veterans Administration Hospital, Long Beach, California, where he died on November 20, 1951. The final diagnosis was "1. Metabolic alkalosis, prerenal azotemia due to prolonged vomiting, cause unknown but probably due to acute alcoholism. 2. Cirrhosis of the liver." (R. 51-54).

Subsequent to the death of the insured, the Veterans Administration assembled all of his records in order to determine what death benefits were payable to his account. At this time his insurance records, which had previously been in the files of the Insurance Service, and his compensation records, always in the files of the Compensation Service, were for the first time brought together and compared, and the discrepancy with respect to comparative health discovered. Upon the refusal of the Veterans Administration to pay on the policy, petitioner brought this action (R. 1).

The District Court awarded summary judgment to petitioner, ruling that the insured, by disclosing his "C" number in answer to question number 10 on the application for reinstatement (*supra*, p. 5), precluded the Government as a matter of law from

claiming reliance on the false representations (R. 13-15). The Court of Appeals for the District of Columbia Circuit reversed, holding that there was no evidence that the Insurance Service ever had actual knowledge of the contents of the insured's disability compensation file, and that in the circumstances of this case it could not be charged with constructive knowledge thereof (Pet. 27-33). Noting that where no claim number is disclosed on a reinstatement application, knowledge of the contents of other files is not imputable to the Insurance Service (Pet. 30), the court stated that this same rule should be applied even where the claim number is disclosed (Pet. 31). It pointed out, first, that since assignment of "C" numbers is not limited to disability claims, a "C" file does not necessarily contain information material to an applicant's comparative health (*ibid.*). Further, that the Veterans Administration's policy of maintaining separate insurance and compensation files was necessary for the agency efficiently to administer its operations; that to expedite its great volume of business, the Insurance Service, pursuant to regulation, customarily reinstated insurance on the representation of the applicant without requisitioning his "C" file; and that this procedure under the regulation is valid (Pet. 31-32). The court stated that *United States* v. *Kelley,* 136 F. 2d 823 (C.A. 9), was not to the contrary and indicated its agreement with the Seventh Circuit's analysis of *Kelley* in *Clohesy* v. *United States,* 199 F. 2d 475 (*ibid.*). Concluding that its views were also supported by

equitable considerations, the Court of Appeals reversed the decision below and remanded the case for trial in order to determine whether all of the elements of fraud were in fact present (Pet. 32-33).

ARGUMENT

1. Section 808 of the National Service Life Insurance Act of 1940, *supra,* p. 3, delegates to the Administrator of Veterans Affairs power to make such rules and regulations as are necessary or appropriate to carry out the purposes of the Act. Pursuant to this authority, the Administrator provided by regulation that certain lapsed policies of National Service Life Insurance might be reinstated on a comparative health basis, that is, where the applicant was in as good health on the date of application for reinstatement as he was on the due date of the premium in default (Regulation 3423 (a), *supra,* p. 3); and he also provided that the applicant's own statement of comparative health could be accepted as proof of insurability for the purpose of such reinstatement (Regulation 3424, *supra,* p. 4).

Here, the insured, in answer to plain questions, falsely declared that he was in as good health at the time of application as he was at the date of lapse, and that he had not been ill nor received medical or hospital treatment since the date of lapse. The problem arises because his beneficiary nevertheless seeks to avoid the Government's defense of fraud by claiming that since the insured also listed the number of his Veterans Administra-

tion claim file on his application for reinstatement the agency was not entitled to rely upon his representations of comparative health. The decision below was clearly correct in holding that the Administration could rely upon the applicant's own representations, thereby sustaining the settled administrative practice established by deliberate decision and justified by both practical and legal considerations.

a. As a practical matter, the Insurance Service was justified in relying upon the insured's own representations of comparative health. The Veterans' Administration has been required by the needs of efficient administration to maintain separately the files of its various services, and accordingly, in order to avoid intolerable delay in processing its vast volume of business,[1] the Insurance Service adopted the procedure of sending for and examing an applicant's claim file for relevant medical evidence only if his answer to one of the com-

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[1] By June 30, 1947, only some 5,700,000 NSLI policies remained in force of the approximately 16,000,000 NSLI policies in force two years earlier, at the termination of hostilities. See Annual Report of the Administrator of Veterans' Affairs for the Fiscal Year Ending June 30, 1945, H. Doc. 467, 79th Cong., 2d Sess., p. 26; Annual Report of the Administrator of Veterans' Affairs for the Fiscal Year Ending June 30, 1947, H. Doc. 453, 80th Cong., 2d Sess., p. 46. In its avuncular relationship to veterans, the Veterans Administration undertook an extensive publicity campaign to persuade veterans to reinstate their insurance. "Through June 30, 1948, the informational program produced approximately 1¾ million applications for reinstatement covering a total of over $10,000,000,000." Annual Report of the Administrator of Veterans' Affairs for the Fiscal Year Ending June 30, 1948, H. Doc. 8, 81st Cong., 1st Sess., p. 66.

parative health questions on the reinstatement application was unsatisfactory. Pet. 31-32; *Clohesy* v. *United States*, 199 F 2d 475 (C.A. 7); *Halverson* v. *United States*, 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695. This practice was followed even where the applicant listed his "C" number; not only are "C" numbers not limited to disability claims, but even where one does refer to a disability claim the claim file may well contain no information at all relevant to the applicant's health during the period of lapse. Pet. 31; *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5). To charge the Insurance Service personnel with constructive knowledge of the contents of an applicant's claim file would be to impose upon them the enormous administrative burden of examining all such files and thus substantially to hamper the Service in its dealings with veterans. Conversely, in relying upon the applicant's own representations, the Insurance Service eliminated "unnecessary delay caused by needless examination of claim files that may be unrelated to comparative health" (Pet. 32).

b. Relevant statutes impose no duty upon the personnel of the Insurance Service to examine an applicant's claim file. Regulation 3423, *supra*, pp. 3-4, authorizing reinstatement of lapsed policies on the basis of comparative health, parallels a former section of the National Service Life Insurance Act which was repealed for the express purpose of permitting the Administrator of Veterans' Affairs to prescribe by regulation the conditions of reinstatement. See former section 602(y) of the National

Service Life Insurance Act of 1940, as amended, enacted by the Act of August 1, 1946, 60 Stat. 781, 787, repealed by the Act of February 21, 1947, 61 Stat. 6; cf. H. Rep. 13, 80th Cong., 1st Sess.; S. Rep. 22, 80th Cong., 1st Sess. The regulation adopts the language of the former section in providing that policies shall be reinstated on evidence "satisfactory to the Administrator." And Regulation 3424, *supra*, p. 4, formulating and publicizing the quantum of evidence which the Administrator deems "satisfactory", provides that the "applicant's own statement of comparative health may be accepted as proof of insurability." The court below properly held that "clearly the procedure under the regulation is reasonably related to efficient administration of the insurance program and is valid" (Pet. 32).

c. Petitioner incorrectly states (Pet. 7) that the practice and custom of the Veterans Administration, at the time of insured's application for reinstatement (April 1948), was to consult the compensation folder whenever the veteran listed his "C" number on his application, and that this practice was continued at least until October 26, 1948. To support this contention she devotes the major portion of her petition to reprinting a letter from the Executive Assistant Administrant and two opinions of the Solicitor of the Veterans Administration (Pet. 7-22). This material, however, conclusively establishes on its face that during the period in question the Veterans Administration was pursuing precisely the opposite policy. For both opinions of the Solicitor contain an excerpt from

Paragraph 9 of the Veterans Administration TB [Technical Bulletin] 9-35, issued July 10, 1947, which expressly states that, at least from that date, even where an applicant lists his "C" number on an application for reinstatement on a comparative health basis, "it will not be necessary to requisition the Claims folder" (Pet. 13, 21).[2] And one of the opinions quoting this excerpt states that "It is apparent from the submission that it was not the practice to consult the insurance file and even though the applicant stated he had applied for compensation or pension to ignore such fact" (Pet. 13-14). Accordingly, there is no doubt that, for at least nine months prior to passing upon the insured's application in the instant case, the Veterans Administration was operating under a clear

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[2] TB-9-35 provided in pertinent part (Pet. 13):

> In any case where "Application for Reinstatement" (nonmedical) (VA Form 9-353a) is received and the applicant answered "Yes" to the question, "Are you now in as good health as you were on the due date of the first premium in default?" and "No" to the question, "Have you been ill, or suffered or contracted any disease, injury, or infirmity, or been prevented by reason thereof from attending your usual occupation, or consulted a physician, surgeon, or other practitioner for medical advice or treatment at home, hospital, or elsewhere in regard to your health, since lapse of this insurance?" and it is indicated in the application that he has applied for disability compensation, retirement pay, pension, or waiver of premiums, or has otherwise been assigned a C-number, it will not be necessary to requisition the Claims folder. Such applications will be forwarded to the Accounts Unit, Underwriting and Insurance Accounts Division, and if all other requirements incident to the reinstatement are met, the application will be approved by the premium review clerk in accordance with existing procedure.

administrative policy, embodied in a Technical Bulletin, not to consult claim files, despite the listing of a "C" number on the application, where an applicant for reinstatement represented that his comparative health entitled him to renew his insurance.[3]

2. Contrary to petitioner's contention, there is no conflict in the court decisions on the question here presented.

a. The pertinent cases recognize and endorse the right of the Veterans Administration to reinstate a lapsed policy of National Service Life Insurance on the applicant's own representation of comparative health without examining his compensation claim file. *United States* v. *Cooper,* 200 F. 2d 954 (C.A. 6); *Clohesy* v. *United States,* 199 F. 2d 475 (C.A. 7); *Halverson* v. *United States,* 121 F. 2d 420 (C.A. 7), certiorari denied, 314 U.S. 695; *Jones* v. *United States,* 106 F. 2d 888 (C.A. 5); *Brown* v. *United States,* 102 F. Supp. 132 (W.D. Mo.); *Clarke* v. *United States,* 102 F. Supp. 338 (E.D. Mo.); cf. *United States* v. *Depew,* 100 F. 2d 725 (C.A. 10); *United States* v. *Riggins,* 65 F. 2d 750 (C.A. 9). Moreover, this conclusion has been reached even where, as here, the applicant informed

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[3] Further, the letter of the Executive Assistant Administrator (Pet. 7-8) expressly rejects the conclusion of the Solicitor, based on *United States* v. *Kelley,* 136 F. 2d 823 (C.A. 9)—discussed *infra,* pp. 14-17—that the United States could not rely on the insured's own representations of comparative health, and directs that the existing practice be continued. In this connection, it should be also noted that the Solicitor's opinions were rendered prior to the decision of the Seventh Circuit in *Clohesy* v. *United States,* 199 F. 2d 475—discussed *infra,* pp. 16-17—which clarified the meaning of the *Kelley* decision.

the Insurance Service of his "C" number by listing it on the application. *McDaniel* v. *United States*, 196 F. 2d 291 (C.A. 5). As the Fifth Circuit there stated (196 F. 2d at 294):

> * * * it cannot be justly held that an insured who has been asked clear and simple questions, upon the understanding that his answers may be accepted as true, without further inquiry, may avoid the consequences of having answered falsely by the claim, that the United States, by consulting the disability files could have found out that what he put forward as true was in fact false, and, therefore, may not complain that it was tricked into reinstating the certificate.

b. Of the two cases relied upon by the petitioner, *United States* v. *Kelley*, 136 F. 2d 823 (C.A. 9) and *Clohesy* v. *United States*, 199 F. 2d 475 (C.A. 7), the former is inapposite and the latter, distinguishing the earlier case, supports the Government's position here.

(i) *Kelley* did not involve the issuance of insurance on a comparative health basis nor did it deal with the listing of a "C" number by the insured on his application for reinstatement. The alleged falsity in *Kelley* related to the insured's statement, on an original application for insurance, that he had never applied for "Government compensation." Although the veteran had applied earlier for disability benefits, the Ninth Circuit affirmed a jury verdict that he had no intent to deceive in so replying, pointing out that the insured

might not have understood that these benefits were "Government compensation." 136 F. 2d at 825. Although this holding was dispositive of the case, the court went on to state by way of dictum that the evidence did not warrant a finding that the Government relied upon or was deceived by this answer. *Ibid.* It declared—and this is the language upon which petitioner relies in attempting to establish a conflict—that the Government had actual, not imputed, knowledge that the insured had filed a disability claim, since the latter application was not in the files of another agency but in the Veterans Administration itself.[4] The court pointed out, however, that in any event the jury could reasonably infer that the personnel of the Insurance Service had actual knowledge of the insured's claim for compensation since the evidence showed that his "C" number had been endorsed on the application for insurance *by an employee of the Veterans Administration* prior to the Insurance Service's approval of his application.

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[4] As the Ninth Circuit recognized, this language was contrary to the earlier decision of the Seventh Circuit in *Halverson* v. *United States, supra,* holding that the various services of the Veterans Administration are, in effect, separate agencies of the Government and that the knowledge of one service cannot be imputed to another. It was also contrary to the decision of the Fifth Circuit in *Jones* v. *United States, supra.* That the earlier decisions in this regard are better reasoned is evidenced by the fact that, subsequent to *Kelley,* they were followed in *United States* v. *Cooper, supra; Clohesy* v. *United States, supra; McDaniel* v. *United States, supra; Brown* v. *United States, supra;* and *Clarke* v. *United States, supra.* In any event, the particular language relied upon was wholly unnecessary to the disposition of the case on either of the two grounds adopted by the Ninth Circuit.

It is plain that there is no conflict. In the instant case, the question was whether the Insurance Service had a duty to examine the *contents* of an insured's claim file because he listed his "C" number on his application for reinstatement. In *Kelley*, the issue was simply whether the Insurance Service had actual knowledge that the insured had filed a claim for compensation, not whether it knew the contents of the claim file. And in the light of the evidence that the number of the compensation claim had been endorsed on the application by a Veterans Administration employee, it appeared that the Insurance Service personnel who processed the application for insurance did in fact know that a claim for compensation had been filed.

(ii) That *Kelley* is limited to its particular facts and to its narrow question is shown by the decision of the Seventh Circuit in *Clohesy* v. *United States*, 199 F. 2d 475, *supra*. There, the applicant, after the reinstatement of his insurance in reliance upon his representations of comparative health, filed a disability benefit claim on the basis of an acute heart attack which he had suffered the day before he filed his insurance application. The disability claim was disapproved as not service-connected, and the insured subsequently wrote to the Insurance Service advising them of the date of his heart attack and the "C" number of his disability claim and inquiring as to possible disability benefits under his insurance. The insured died soon afterward and his beneficiary, relying heavily upon *Kelley*, contended that the policy

could not be contested for fraud as the true facts were in the files of the Veterans Administration. The Seventh Circuit, however, refused to give to the language in *Kelley* "the broad application for which the plaintiff here contends" (199 F. 2d at 477). The court stated (*ibid.*):

> There it was shown that all applications by veterans for compensation were identified by a "C" number and that the veteran's application for insurance in that case, at the time it was approved by the Insurance Section, bore his "C" number, thus showing to the person or persons passing on the application that the veteran had then made an application for Government compensation. On the particular facts of that case we agree that there the knowledge, not only of the Veterans Administration but of the Insurance Section of that department, could be properly said to be "actual, not imputed". Under those circumstances we think the court properly held that the Government could not claim that fraud of the insured caused the approval of the insurance application.

Recognizing that *Clohesy* involved an entirely different question—one substantially identical to that in the instant case—the Seventh Circuit held that the Insurance Service had no actual knowledge of the contents of the claim file, which was in the possession of another office, and that such knowledge could not be imputed to it. That ruling fully accords with the decision below.

CONCLUSION

For the foregoing reasons we respectfully submit that the petition for a writ of certiorari should be denied.

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PETITIONER'S REPLY BRIEF

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UNITED STATES OF AMERICA, *Respondent.*

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